NO. 85-214

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF DELAWARE,

Petitioner,

v.

WILLIAM A. FENSTERER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

RESPONDENT'S BRIEF IN OPPOSITION

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September 7, 1985

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. WHETHER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS VIOLATED WHEN AN EXPERT WITNESS FAILS TO COMMIT HIMSELF TO THE BASIS OF HIS OPINION ON A HIGHLY MATERIAL ISSUE IN AN ENTIRELY CIRCUMSTANTIAL CASE, THEREBY RENDERING DEFENSE COUNSEL'S CROSS-EXAMINATION AN EXERCISE IN FUTILITY?

II. WHETHER A VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO UNITED STATES CONSTITUTION COMPELS REVERSAL WHEN AN EXPERT WITNESS FAILS TO COMMIT HIMSELF TO THE BASIS OF HIS OPINION ON A HIGHLY MATERIAL ISSUE IN AN ENTIRELY CIRCUMSTANTIAL CASE?

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William A. Fensterer respectfully requests that this Court deny the Petition for Writ of Certiorari.

OPINION BELOW

The opinion of the Supreme Court of Delaware is reported at 493 A.2d 959.

STATEMENT OF THE CASE

Fensterer was tried on the charge of Murder in the First Degree. The trial began on January 9, 1984, and lasted approximately three weeks. There were no confessions or eyewitnesses to the crime; the State's evidence was entirely circumstantial. After four days of deliberations, the jury returned a verdict of guilty of Murder in the Second Degree. On appeal, the Delaware Supreme Court reversed the conviction on the ground that the testimony of an FBI agent was inadmissible under the Confrontation Clause because the agent failed to commit himself to the basis of his expert opinion. The court held that "[w]ithout an acknowledgment of the basis of his opinion, defense counsel's cross-examination of the Agent was nothing more than an exercise in futility." 493 A.2d at 964. The Court held that the agent's testimony concerned a "highly material issue" in the case and the denial of effective

cross-examination compelled reversal. Id. "For us to do anything else would pervert the right of a person to confront the witnesses against him in a criminal trial." Id.

Stephanie Ann Swift's body was found in the backseat of her car on September 29, 1981. Dr. Judith Tobin, an Assistant State Medical Examiner, performed an autopsy. Dr. Tobin gave at least five different opinions as to the time of death. Her final estimate was that Stephanie died between 3:30 p.m. and 8:00 p.m. on September 28. (Tr. IX-30) A defense expert, who was a board-certified forensic pathologist, placed the time of death between 3:00 p.m. and 3:30 p.m. based on the alcohol present in Stephanie's blood and the condition of her stomach's contents. (Tr. XII-85)

William Fensterer, a 23-year-old bookkeeper-accountant, first met Stephanie in February, 1981. They began dating and

subsequently living together in June, 1981, in Milford, Delaware. (Tr. V-23) Bill had given Stephanie an engagement ring shortly before her death. Stephanie, a 17-year-old high school senior, had previously dropped out of high school, but after she began dating Bill, she resumed school commuting over forty miles each way.

On September 25, 1981, Bill and Stephanie traveled to Atlantic City, New Jersey, with Stephanie's grandmother and her boyfriend. Before leaving, Stephanie took the couple's pets to her parent's residence near Millsboro as she had on prior occasions. (Tr. V-69) Stephanie and Bill returned to Milford on September 27. Bill did laundry and cooked dinner while his fiancee worked on a paper for school.

Bill went to work on September 28 at 8:00 a.m. after making love with Stephanie. (Tr. XI-39) He worked until 12:30 p.m. when he and Stephanie went to lunch at a local Italian

restaurant. (Tr. XI-41) According to the waitress, the couple seemed happy and were holding hands upon leaving. (Tr. X-143) Bill returned to work and Stephanie left to go shopping. She purchased a sponge mop which was still in her car when her body was discovered the next day. (Tr. IV-130)

Bill remained at work until 4:55 p.m. When he returned to the couple's apartment, neither Stephanie nor her car were there. At 5:42 p.m., he called Stephanie's parents and learned that she had not picked up the pets as previously planned. (D. Exh. 48-50) After waiting about ninety minutes, he left Stephanie a note chastising her for her irresponsibility and drove to Millsboro, a 28 mile drive. (Tr. XI-47) He stayed at Stephanie's parents' home approximately 20 minutes. (Tr. XI-49) Although Stephanie's mother testified at trial that Bill left the house between 6:15 and 6:30 p.m., she testified at the preliminary hearing that Bill

was there at 6:55 p.m. The latter testimony was consistent with a written statement to Milford Police two weeks after Stephanie's death.

Bill called Mrs. Swift at 8:17 p.m. to determine if Stephanie had been there after he had left. (Tr. XI-66) He made other calls, including calls to the police to determine if Stephanie had been involved in an automobile accident. He left the apartment and drove around Milford looking for his fiancee.

Stephanie still had not returned when Bill awoke the following morning. Leaving a note expressing his concern, Bill drove to his place of employment. At his employer's suggestion, he filed a missing person report.

Shortly thereafter, a car parked in a local shopping center with a body inside was discovered. A brown cord approximately 25" in length was found near the car. While removing Stephanie's body, a black hair on her leg blew away despite police efforts to secure it.

Stephanie's hair was blond, while Bill's is brown. Police technicians lifted 26 fingerprints from the automobile including 17 prints which did not belong to either Bill or Stephanie. (Tr. VIII-32)

The couple's apartment was secured. At trial, the State's theory was that Bill strangled his fiancee with a cat leash. The State contends that Bill surreptitiously picked up and attempted to wipe the leash off. At trial, Rick Huff, who observed the incident, testified that in his opinion Bill was not attempting to wipe the leash. (Tr. XII-62) Milford Police told Bill that he could remove the leash along with his other personal belongings, but Bill elected not to do so and left the leash in the apartment. Milford Police later searched the apartment with Bill's consent and removed many items, including the cat leash and the clothing Bill had worn the preceding day.

The State's contention that the leash was the murder weapon was based on three items of circumstantial evidence. First, two head hairs on the leash had similar characteristics to those of Stephanie's hair and one was alleged to have been forcibly removed. (Tr. VII-74) Second, a substance removed from the leash was found to contain three common major compounds, which were also found in a sample of Stephanie's stomach contents. (Tr. VII-101-03) Third, some of the marks on Stephanie's neck could have been caused by the cat leash. (Tr. IX-22) The State contended that Stephanie was murdered in the couple's second floor apartment, carried down steps and then driven to the shopping center. The State also argued that during the strangulation Stephanie vomited.

The defense adduced evidence that while the apartment walls were thin, a neighbor directly below heard nothing. (Tr. VII-43) In addition, the defense established that no

vomitus material was found in the apartment or on Bill's clothing.

The State adduced evidence through Agent Robillard, that one of the hairs on the cat leash had been forcibly removed from Stephanie's head. During voir dire, the agent testified in his experience there were three methods which could be used to determine if a hair had been forcibly removed. (Tr. VII-58) He indicated that his notes did not reveal which method he used to make the determination in this case. Id. He could point to no scientific authority which supported one of his three theories, dealing with the growth phase of hair and presence of a follicular tag. (Tr. VII-59) It later developed through Defendant's expert that this was the theory relied upon. Defendant objected to the testimony of Agent Robillard on two grounds. First, assuming that one of the three theories had been relied upon, the agent could not point any scientific authority which

supported the proposition that the presence of a follicular tag on a telogen phase hair indicated the hair had been forcibly removed. (Tr. VII-62-63) Second, Defendant objected that there was no way to adequately cross-examine the agent if he could not testify as to which of the three theories he relied upon. The judge overruled the objection stating that the arguments went to the weight of the evidence, not its admissibility. The agent testified that the degree of force which was sufficient to remove the hair was as little as running one's fingers through the hair or briskly combing the hair.

Defendant presented testimony through its own expert, Dr. Peter DeForest of Hartsdale, New York, that in his opinion no conclusion could be drawn as to whether they had been forcibly removed from the head. Furthermore, he said all scientific authority contradicted the agent's theory that the presence of a follicular tag on a telogen phase hair indicated that the

hair had been forcibly removed. In addition, he stated that over 100 hairs fall out of the head every day. Testimony was adduced that Stephanie had a habit of carrying her cat on her shoulder with the leash attached.

The State presented expert testimony through Agent Martz of the FBI that the leash had a one-inch reddish brown stain which contained three major compounds, including palmitic acid, cholesterol and starch. He testified that the stomach contents contained palmitic acid, cholesterol and starch. The defense presented expert testimony that the three compounds in the substance on the leash are found everywhere in animal, human and biologic material and are common ingredients in food and food products. (Tr. XI-13) The expert testified that he had examined the cat food and dog food eaten by their pets; both contained these three materials. He testified that those items would be expected to be found in vomit. Testimony was

introduced that the cat vomited from motion sickness on occasion after riding in an automobile. Finally, the expert testified that although there were a number of tests which could have been performed on the substance which would have discriminated as to whether it was human or animal vomit or whether in fact it was vomit at all, there was no indication in the FBI report that these tests had been performed.

REASONS FOR DENYING THE WRIT

A. THE DELAWARE SUPREME COURT FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUE.

The court below held that Fensterer was denied his right to effectively cross-examine a key state witness on a highly material issue and, therefore, his Sixth Amendment right to confront the witnesses against him was violated. 493 A.2d at 946. Respondent submits the Delaware Supreme Court fully considered and

correctly decided the Confrontation Clause issue.

1. FACTS OF THE CASE.

Since this case turns on its own unique facts and circumstances[1], it will be helpful to briefly highlight the critical facts. This was a case based solely on circumstantial evidence. The State contended that Fensterer strangled his fiancee with a cat leash owned by the couple. The State attempted to establish that the leash was the murder weapon by showing that the hair found on the leash was forcibly removed during the strangulation. The State relied on the testimony of Alan Robillard. He testified that the hair on the leash was Stephanie Swift's and that it had been forcibly

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[1]That this case turns on its own narrow facts and circumstances is a further reason for denying the writ. Because the unusual facts of this case rarely arise, few other litigants would be affected. R. Stern & E. Gressman, Supreme Court Practice, 490 (5th ed. 1978) [hereinafter cited as Supreme Court Practice].

removed. According to Robillard, there are three theories upon which a determination could be made that hair had been forcibly removed. However, Robillard could not state the basis of his conclusion.

On appeal, the Delaware Supreme Court reversed. The Court held that:

> Effective cross-examination and discrediting of Agent Robillard's opinion at a minimum required that he commit himself to the basis of his opinion. Without an acknowledgement of the basis of his opinion, defense counsel's cross-examination of the agent was nothing more than an exercise in futility. Id.

The court was compelled to reverse; otherwise, Fensterer's right to confront the witnesses against him would have been perverted. Id. Thus, the court reversed Fensterer's conviction on the narrow ground that the failure of an expert witness to state the basis of his opinion on a key issue violated Fensterer's right to be confronted by the witnesses against him.

2. FENSTERER'S CONFRONTATION RIGHTS WERE DENIED.

The Confrontation Clause of the Sixth Amendment to the United State Constitution guarantees the accused the right to be confronted with the witnesses against him. One primary interest secured by the Confrontation Clause is the right of cross-examination. Douglas v. Alabama, 380 U.S. 415, 418 (1965). As Professor Wigmore stated:

> The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

5 J. Wigmore, Evidence §1395 (3d ed. 1940).

As this Court noted in Davis v. Alaska, 415 U.S. 308 (1974), cross-examination is the principle means of testing the

believability of a witness and the truth of his testimony.

> Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.

Id. at 316.

Cross-examination has been regarded as an essential safeguard of the accuracy and completeness of testimony. McCormick on Evidence, §19 (2d ed. 1972).

In this case, the witness being subjected to cross-examination was an expert witness. In impeaching an expert witness, the cross-examiner seeks to show that the witness is not qualified because of deficiency in education, knowledge, training or experience. Alternatively, the cross-examiner may seek to show that the "expert's" opinion is not based on scientifically-accepted principles. In this

case, defense counsel was attempting to utilize the latter method of impeaching an expert witness. Here, Robillard could not state the theory upon which he determined that the hair had been forcibly removed. Since Robillard could not acknowledge the basis of his opinion, the jury was deprived of the means to test the accuracy of his opinion. McCormick, §19. There is a tremendous difference between showing that Agent Robillard has a faulty memory and showing that he is a "bad expert". Since Robillard did not acknowledge the basis of his opinion, defense counsel was unable to force Robillard to acknowledge that his conclusion was contradicted by all scientific authority and thereby impeach Robillard out of his own mouth. The testimony of the defense expert, Dr. Peter DeForest, was clearly not the equivalent of Agent Robillard's acknowledgement of his theory.

Without Agent Robillard's acknowledgement of the basis for his conclusion, the jury

could have believed that the conflicting testimony of Robillard and Dr. DeForest was simply a dispute between the experts over scientific theories instead of a conflict between a scientific accepted theory (DeForest) and a conclusion which was contradicted by all scientific authority. (Robillard)

B. STATE GROUNDS, ALTHOUGH NOT ADDRESSED BELOW, SUPPORT THE DECISION OF THE DELAWARE SUPREME COURT TO REVERSE FENSTERER'S CONVICTION.

In the decision below, the Delaware Supreme Court reversed Fensterer's conviction on the ground that he was denied his Sixth Amendment right to confront the witnesses against him because he was unable to effectively cross-examine a key state witness. In light of the reversal on confrontation clause grounds, the court did not address other issues raised by respondent. See Fensterer v. State, 493 A.2d 959, 962 n. 3, 967 (1985). Among the issues not addressed by the court below is Fensterer's

contention that Agent Robillard's testimony was inadmissible under Delaware Rule of Evidence 705. Id. at 962, n. 3.

It is well settled that this Court will not review a state case if the state court decision rests upon independent and adequate state grounds. E.g., C. Wright, The Law of Federal Courts 745-52 (1983). The rationale for this Rule is that this Court's

> only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) (Jackson, J.). While Fensterer acknowledges that the doctrine of adequate and independent state grounds is not directly implicated in this case since the court below did not actually

decide the case on the evidentiary ground, he submits that the court below would reach the same result on that point and, therefore, this Court should deny the petition for writ of certiorari. Supreme Court Practice, supra note 2, 490-91.

1. The Rule of Evidence Argument.

Rule 705 of the Delaware Rules of Evidence provides:

> (a) Disclosure of facts or data underlying expert opinion. The expert may testify in terms of opinion or inference, provided he first identifies the facts or data upon which he basis his opinion and his reasons for the opinion, unless the Court requires otherwise. The expert may, in any event, be required to disclose the underlying facts or data on cross-examination.
>
> (b) Objection. An adverse party may object to the testimony of an expert on a ground that he does not have a sufficient basis for expressing an opinion. He may, before the witness gives his opinion, be allowed to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based.

Id. (emphasis added).

The trial court erred in admitting the testimony of special Agent Robillard and then compounded the error by failing to strike that portion of his testimony dealing with forcible hair removal. The agent was never able to state which one of three theories he was relying upon to indicate that the hair had been forcibly removed. Generally, an expert witness is expected to state the entire basis for his opinion. Eaton v. State, 394 A.2d 217, 219 (Del. 1978). Furthermore, an expert must state the facts underlying his conclusion. Bates v. State, 386 A.2d 1139, 1144 (Del. 1978). See also Alterio v. Biltmore Construction Corp., 119 R.I. 307, ___, 377 A.2d 237, 240 (1978) (holding expert testimony inadmissible where expert unable to state the factual basis upon which his opinion was predicated and effective cross-examination was thereby precluded. These principles are both embodied in Delaware Rule of Evidence 705.

A proper factual foundation under Rule 705 was not established and, therefore, the agent's testimony as to the forcible removal of head hairs should have been stricken. Failure of trial court to strike this testimony denied Fensterer his right to cross-examine witnesses called against him. McCormick, §19. Cross-examination of Robillard was extremely limited because the agent did not know which of the three methods he had relied upon to reach his conclusion that the hair had been forcibly removed from Stephanie Swift's head. Therefore, Fensterer was, in effect, on a fishing expedition in attempting to cross-examine this witness. By testifying in conclusory terms, the agent was effectively denying Fensterer the right to cross-examine him. Alterio, 119 R.I. at ___, 377 A.2d at 240.

In United States v. Mangan, 575 F.2d 32 (2d Cir. 1978), the court stated that the government had a serious obligation not to

obstruct a criminal defendant's cross-examination of expert testimony. It added that the government should have told its experts to be prepared in court to respond to defense requests for information about the basis of the expert's opinion. Such obligation was not met in this case.

Expert testimony should always be scrutinized carefully and subjected to rigorous cross-examination to test the foundation on which it is formed. Fabritz v. State, 30 Md. App. 1, 351 A.2d 477, 484, cert. denied, 425 U.S. 942 (1976). Cross-examination is the principal means by which the believability and the truth of a witness' testimony is tested. Davis v. Alaska, 415 U.S. 308 (1974). Under the factual circumstances of this case, the Defendant's right to cross-examine the agent was emasculated since the agent was unable to establish the underlying factual basis upon which he relied to reach his conclusion.

Therefore, the trial judge erred as a matter of law in refusing to strike the testimony of the agent concerning the forceful removal of hair. This error necessarily prejudiced the rights of the Defendant because of the danger that a jury accords excessive weight to expert testimony because the evidence is labeled scientific and expert. State v. Cavallo, 88 N.J. 508, 443 A.2d 1020 (1982). This danger is increased when that witness carries the prestige of the Federal Bureau of Investigation behind him. In addition, Agent Robillard's conclusion that a hair on the leash was forcibly removed was a highly material issue in this case. The conclusion showed that at least one hair on the leash was from the strangulation, and thereby established the leash as the murder weapon. Since the leash belonged to Fensterer and Stephanie Swift, establishing that the leash was the murder weapon points toward Defendant's guilt.

In its opinion, the Delaware Supreme Court expressed grave concern over Fensterer's inability to effectively cross-examine Agent Robillard. At one point, the court below stated that in light of Agent Robillard's failure to acknowledge the basis of his opinion, "cross-examination of the Agent was nothing more than an exercise in futility". 493 A.2d at 964. The court further stated:

> In some, although we cannot say for sure what would have happened if Agent Robillard disclosed the scientific theory upon which he relied, we do know that without such a disclosure, Fensterer was denied his right to effectively cross-examine a key State witness. Id.

In view of the grave concerns expressed of the Delaware Supreme Court, Fensterer submits that, even if this Court were to grant certiorari and reverse the decision of the Delaware Supreme Court, the lower court would reverse his conviction on the evidentiary grounds. In that event, this Court's opinion

would amount to little more than a revision of the Delaware Supreme Court opinion. Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). Conservation of judicial resources counsel against such a result.

C. THE DELAWARE SUPREME COURT DID NOT APPLY AN AUTOMATIC RULE OF REVERSAL, BUT INSTEAD FOUND THAT THE VIOLATION OF THE CONFRONTATION CLAUSE PREJUDICED THE DEFENDANT.

In its Petition for a Writ of Certiorari, the State asserts that the Delaware Supreme Court reversed Fensterer's conviction without considering whether the error was harmless. The State contends the Delaware Supreme Court applied the automatic reversal rule announced in Van Arsdall v. State, 486 A.2d 1 (Del. 1984), cert. granted, ____ U.S. ____ (1985) (No. 84-1279) and Weber v. State, 457 A.2d 674 (Del. 1983).

The State's position is patently erroneous. The court below found the violation

of the Confrontation Clause prejudiced the Defendant. The Court stated:

> A special agent from the Federal Bureau of Investigation can appear to be a highly credible person to the average lay jury. Effective cross-examination and discrediting of Agent Robillard's opinion at a minimum required that he commit himself to the basis of his opinion. Without an acknowledgment of the basis of his opinion, defense counsel's cross-examination of the agent was nothing more than an exercise in futility.
>
> A matter which is highly material deserves extensive cross-examination. Skinner v. Cardwell, 9th Cir., 564 F.2d 1381, 1389 (1977), cert. denied, 435 US 1009 (1978). Agent Robillard's conclusion that a hair on the leash was forcibly removed was a highly material issue in this case. The conclusion showed that at least one hair on the leash was from the strangulation, and thereby established the leash as the murder weapon. The leash belonged to Fensterer and Stephanie.
>
> Moreover, we cannot rule out the possibility that had Agent Robillard committed himself to the theory upon which he rested his conclusion, he could have been completely discredited. A complete discrediting of the Agent's testimony that one hair was forcibly removed would have reflected poorly on the accuracy of

> the Agent's other testimony, including his testimony on the identification of the two hairs on the leash as Stephanie's.
>
> In sum, although we cannot say for sure what would have happened if Agent Robillard disclosed the scientific theory upon which he relied, we do know that without such a disclosure, Fensterer was denied his right to effectively cross-examine a key State witness. We have no choice but to reverse Fensterer's conviction. For us to do anything else would pervert the right of a person to confront the witnesses against him in a criminal trial.

493 A.2d at 464 (emphasis added).

In support of its position that the admission of Agent Robillard's testimony concerning the hair on the leash, the State argues that the hair analysis was only a portion of the evidence which allegedly establishes the cat leash as the murder weapon. The State points to evidence of the marks on Stephanie Swift's neck and the vomitus present on the leash. This evidence was not undisputed as the State seems to imply. It must be noted that

there were multiple marks about the neck and shoulders of Stephanie Swift and that Dr. Tobin's testimony related only to certain linear marks. While Dr. Tobin examined the cat leash and said it was consistent with the marks on the back of the neck, she admitted that it was possible that another instrument could have made the linear marks. In addition, there was no testimony that the leash could leave a mark .4 cm, the width of one horizontal abrasion on the neck. As to the reddish brown stain on the leash, a well-respected defense expert testified that the three compounds found in the substance on the leash were ubiquitous and are found everywhere in animal, human and biologic materials. The expert had examined the food eaten by the couple's cat and dog and found that both items contained the materials present on the leash. In addition, there was testimony that the cat vomited from motion sickness on occasion after riding in an automobile. More

importantly, there was no evidence that the material on the leash was vomit at all or, if it was vomit, whether it was human or animal vomit as the FBI apparently did not perform the test which would discriminate between human or animal vomit. Therefore, the evidence as to the hair was highly material.

CONCLUSION

For the reasons expressed above, this Court should deny the State's Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED,

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APPENDIX A

Excerpts of Trial Transcript Volume VII at 57-63
Voir Dire Examination of Agent Alan Robillard

[57]

* * *

Q. [defense counsel] Agent Robillard, what scientific or physical studies conducted by other people have you consulted that supports this theory that the presence of the follicular tag indicates forcible removal?

[58]

A. Let me step back one step with regard to the presence of the follicular tag. That is one of the ways that I am able to determine hair if forcibly removed. There are two other ways.

As to the exact manner in which this particular hair was forcibly removed, I don't know. I have no indication in my notes other than the fact it was forcibly removed.

So to answer your question about the follicular tag, yes, that is possible that it was there.

Q. You have no indication in your notes how you determined that this hair was forcibly removed?

A. Other than the fact it was forcibly removed, that's true. I have no indication. I do have personal knowledge that it was based on one of the three characteristics.

Q. One of the three characteristics. Do you remember which one it was?

A. No, sir, I don't.

MR. WHITEHURST: I beg the Court's indulgence.

BY MR. WHITEHURST:

Q. What are the other two characteristics?

[59]

A. It can either be based on the fact that the root itself has been elongated and

misshaped or there is a sheath of skin surrounding the root area.

Q. The elongated or misshape is commonly known as the hair being in the anagen phase; isn't it?

A. The fact that the root is elongated would be an indication that the hair was in the anagen phase, which is the growing stage, when it was forcibly removed from the skin.

Q. Office Robillard, if you had made the determination based on the presence of the follicular tag--and let's not assume the other two.--

A. Okay.

Q. What scientific or physical studies that are recognized in the scientific community have you consulted which support your theory that means a hair has been forcibly removed?

A. Just offhand I can't name a specific study that says that. However, based on my experience -- and I have been doing this for six

years and I have looked at many hairs -- a hair that has connective tissue at its base and depending on its stage of growth is an indication that the hair was forcibly removed from the skin.

Q. Speaking just to the presence of the follicular tag there is no specific work that you know of and it is not a recognized scientific principle that means the hair has been forcibly removed; isn't that correct?

[60]

Q. There has been. The exact study I am not sure. I recall one from a British study. I talked about connective tissue.

Q. Agent Robillard, is it possible that was the Morophology and Occurrences of Human Hair Sheath Cells by A.I. King?

A. I don't know. Let me see and I will tell you.

MR. WHITEHURST: If I may approach the witness.

THE COURT: All right.

BY MR. WHITEHURST:

Q. I hand you the first page of that.

A. Can I see the portion that has the conclusions?

MR. BUNITSKY: Yes. Your Honor, there is something more complete.

MR. WHITEHURST: Certainly.

THE WITNESS: This particular study seems to be talking about the sheath cells. I don't recall specifically which one talked about connective tissue.

As I said, based on my experience, when I see a hair that has connective tissue that is an indication to me that that hair has been forcibly removed.

[61]

BY MR. WHITEHURST:

Q. You don't have any scientific text to support that?

A. In my hand, no. I believe I can talk about my experience and my readings.

Q. Can you make reference to any recognized hair expert in the United States or the world that supports that theory? Give us the name of one.

A. There is a possibility. I can't recall specifically but in the text written by Pillsbury and Montagna, it talks about connection tissue. It is histology text and it refers to the manner in which a hair, when it is growing or nourished or adhering to the skin follicle.

Q. Yes. That is a mere possibility; isn't that right? You are saying there is a possibility there is something in there.

A. I am saying if I had the text in front of me.

Q. Did you do the work on the hairs yourself?

A. The microscopic examination?

Q. Yes.

A. Yes, I did.

Q. Have you ever studied under any recognized hair experts in the United States?

A. Yes, I have.

[62]

Q. For example who.

A. For example the experts that trained me at the FIB laboratory.

Q. Has he ever written any scientific books or documents that will support your theory? If you can give me his name.

A. Yes, sir, he has, I believe. Mr. John Hicks.

Q. You believe. Can you tell me the name of the document or the book?

A. I can refer to the publication. It was published by the FBI laboratory. Microscopy of Hairs is what it is called. Now, the exact words that are in that book, Your Honor, I am not sure I could quote exactly.

Q. Can you today direct me to any book that you know of that will say that the presence of a follicular tag on the end of a hair indicates it was forcibly removed?

MR. BUNITSKY: I think it is about the third time he has asked the witness that question. He answered. He said he didn't know about any particular study. It is based on his experience and reading. It is his opinion.

MR. WHITEHURST: Your Honor, I think the witness has disqualified himself right now. It is not a recognized scientific principle. He can't establish it. He can qualify as an expert based on experience but their experience has to be in an area where there is a recognized scientific principle.

[63]

THE COURT: Do you have a hair expert that is going to testify?

MR. WHITEHURST: Yes, Your Honor, we do. He is going to contradict what he is going to say.

I am not certain what the agent is going to say but I am certain he is going to get in the area and contradict what he is going to say about whether the presence of the follicular tag means the hair has been forcibly removed or not.

THE COURT: He is going to state that is not your position?

MR. WHITEHURST: That is not a recognized scientific principle.

THE COURT: He is testifying from experience. An expert doesn't need much expertise to be an expert. You remember the charge, "Some information not common to his fellowman." I think he does. He has worked with this for six years. You have an expert that is going to contradict him. I think we are going to leave the whole thing to the jury.

MR. WHITEHURST: Fine, Your Honor. Note our objection on the record.